Textainer Equipment Management Ltd v Hub Shipping Sdn Bhd (in liquidation and with permission to begin proceedings as granted on 19 October 2016) & Anor

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-677–12 OF 2016
GUNALAN MUNIANDY J
13 FEBRUARY 2018

Contract — Privity — Privity of contract — Whether contractual relationship existed between plaintiff and first defendant — Whether contractual relationship existed between defendants — Whether plaintiff entitled to sue for compensation

The plaintiff was in the business of managing and/or leasing marine or intermodal shipping containers all over the world belonging to it or on behalf of other. The first defendant was the plaintiff's customer. It was wound up by the Shah Alam High Court on 17 February 2016 pursuant to a winding up petition presented against it by the plaintiff for the unpaid sum of USD$3,733,810.22 or RM13,775,892.80 as of 1 July 2015. An interlocutory judgment in default of defence was entered by the plaintiff against it on 23 May 2017. The second defendant provided container storage service at its own premises at Pelabuhan Klang. It presently detained at its premises 209 shipping containers owned or managed by the plaintiff, which were leased by the plaintiff to the first defendant under their mutual contracts. The plaintiff sought the return of those 209 shipping containers but the second defendant refused to do so. The plaintiff contended that the second defendant had no contract or contractual relationship with the first defendant. Consequently, the second defendant had no right to detain, or to the continued detention of, the 209 shipping containers, and that the second defendant must allow or not prohibit, the return of the same to the plaintiff. The plaintiff, by its default judgment of 23 May 2017 had obtained against the first defendant these orders: (a) a declaration that the 209 shipping containers were leased to it by the plaintiff; (b) a declaration that the plaintiff was in law entitled to, or to the return of, the 209 shipping containers; and (c) an order for damages to be assessed. Following the default judgment, the trial proceeded against the second defendant only to determine who had the better right or entitlement in law to the subject containers.

Held, allowing plaintiff's claim with costs of RM30,000:

(1) Having given due consideration to the principle of law relating to the effect of a judgment in default that remained in force and the uncontradicted evidence, the only conclusion would be that the contractual relationship between the plaintiff and the first defendant

concerning the subject containers was well established. Any losses or damages sustained by the plaintiff in respect of the lease of the subject containers to the first defendant should be directed at the first defendant only in accordance with the agreed terms in the agreement between the plaintiff and the first defendant and not at the second defendant who were not a party to the same (see paras 11–12).

(2) The second defendant did not lead any evidence to establish a bailor-bailee relationship between the first defendant and the second defendant. Neither as to who were the bailor and bailee respectively. It was contended that there was an agent-principal relationship between the first defendant and the second defendant without alluding to any evidence showing for whom the second defendant was acting as an agent. No evidence was led showing the existence of a contractual relationship in respect of the goods in their possession. The assertion in respect of the second defendant's alleged right of lien against the plaintiff was wholly unsustainable as it was common ground between the second defendant and the plaintiff that there was no contract between them at the material time. The law was settled that the claim of a lien was only maintainable if there was in existence a contract between the parties (see paras 26 & 29).

(3) The plaintiff was a complete stranger to the purported lease agreements between the first defendant and the second defendant. By virtue of the doctrine of privity of contract, it was trite law that a non-party had no right to sue under the contract. Hence, the contention that the plaintiff should sue the first defendant only for compensation was plainly baseless based on principles of contract law (see para 32).

[Bahasa Malaysia summary

Plaintif menjalankan perniagaan menguruskan dan/atau menyewa peralatan perkapalan kepunyaan plaintif dan juga kepunyaan individual lain di serata dunia. Defendan pertama telah digulungkan oleh Mahkamah Tinggi Shah Alam pada 17 Februari 2016 melalui satu petisyen penggulungan yang dikemukakan oleh plaintif untuk satu jumlah tunggakan bayaran berjumlah USD$3,733,810.22 atau RM13,775,892.80 pada 1 Julai 2015. Satu pembelaan interlokutori penghakiman ingkar telah dimasukkan oleh plaintif terhadap defendan pertama pada 23 May 2017. Defendan kedua menyediakan perkhidmatan penyimpanan peralatan di kediamannya di Pelabuhan Klang. Sebanyak 209 peralatan perkapalan yang dimiliki atau diuruskan plaintif disimpan, di mana ianya telah disewakan oleh plaintif kepada defendan pertama di bawah kontrak persetujuan sesama mereka. Plaintif menuntut pemulangan 209 peralatan perkapalan tersebut tetapi tidak dipersetujui oleh defendan kedua. Plaintif menegaskan defendan kedua tidak mempunyai kontrak atau hubungan secara kontrak dengan defendan pertama. Atas sebab itu, defendan kedua tiada hak untuk menyimpan 209 peralatan perkapalan tersebut dan defendan kedua tidak boleh menolak tuntutan plaintif yang

mahukan pemulangan peralatan perkapalan tersebut. Plaintif, melalui penghakiman ingkar pada 23 Mei 2017, telah mendapat perintah terhadap defendan pertama: (a) satu deklarasi bahawa 209 peralatan perkapalan telah disewa kepada defendan pertama oleh plaintif; (b) satu deklarasi bahawa plaintif berhak di sisi undang-undang untuk menuntut pemulangan 209 peralatan perkapalan; dan (c) satu perintah pengiraan jumlah ganti rugi dilaksanakan.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM30,000:

(1) Dalam mengambil kira prinsip undang-undang berkenaan kesan perintah penghakiman ingkar yang masih berkuat kuasa dan keterangan yang tidak bercanggah, rumusan yang boleh dibuat ialah hubungan kontrak diantara plaintif dan defendan pertama adalah wujud dengan jayanya. Sebarang kerugian atau ganti rugi yang dialami plaintif berkenaan penyewaan peralatan perkapalan terhadap defendan pertama hanyalah boleh dituntut pada defendan pertama berdasarkan terma persetujuan yang hanya mengikat plaintif dan defendan pertama. Defendan kedua bukannya pihak dalam perjanjian (lihat perenggan 11–12).

(2) Defendan kedua tidak menunjukkan sebarang bukti adanya hubungan penjamin-baili di antara defendan pertama dan defendan kedua. Defendan pertama dan defendan kedua kedua-duanya bukan penjamin-baili. Adalah didapati bahawa wujudnya hubungan ketua dan ejen diantara defendan pertama dan defendan kedua tanpa dikemukakan sebarang bukti defendan kedua bertindak sebagai ejen kepada siapa. Tiada bukti atau keterangan yang menyokong kewujudan hubungan kontrak dalam pegangan peralatan perkapalan oleh pihak-pihak. Anggapan defendan kedua yang mengatakan defendan kedua mempunyai hak lien terhadap plaintif adalah tidak berasas disebabkan tiadanya hubungan kontrak antara pihak-pihak dalam masa yang material. Undang-undang adalah mantap mengatakan bahawa tuntutan lien hanya boleh dibuat sekiranya wujud hubungan kontrak di antara pihak-pihak (lihat perenggan 26 & 29).

(3) Plaintif secara terang-terangan bukannya pihak-pihak dalam perjanjian sewaan diantara defendan pertama dan defendan kedua. Melalui prinsip priviti dalam kontrak, adalah menjadi undang-undang yang mantap mengatakan seseorang yang bukannya pihak-pihak dalam mana-mana kontrak tidak mempunyai hak untuk menyaman di bawah kontrak tersebut. Oleh itu, anggapan plaintif yang sepatutnya menyaman defendan pertama berkenaan dengan pampasan adalah tidak berasas berdasarkan prinsip undang-undang kontrak (lihat perenggan 32).]

Notes

For cases on privity of contract, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6361–6369.

Cases referred to

Caveat No CV/21366D, Re [1996] 1 SLR(R) 70, HC (refd)
Chip Thye Enterprise v DBS [1993] 3 SLR(R) 380, HC (refd)
Cooperative Centrale v Motorola Electronics [2011] 2 SLR 63, CA (folld)
Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor [2005] 3 MLJ 293; [2004] 2 MLRA 462, CA (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (folld)
Lee Container v Tahan Tractor [1996] 1 MLRH 146 (distd)
Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd [2006] 4 MLJ 189; [2006] 3 CLJ 72, CA (refd)
Polygram Records Sdn Bhd v Hillary Ang & Ors [1988] 3 MLJ 37; [1994] 2 MLRH 137, HC (refd)

Legislation referred to

Contracts Act 1950 ss 101, 123

Adi Razlan bin Hj Abdul Rahman (Mohd Faizal bin Ahmad with him) (Adi Radlan & Co) for the plaintiffs.
Silas Seenivasagam (Azariah & Assoc) for the second defendant.

Gunalan Muniandy J:

[1] This claim concerns 209 shipping containers ('the subject containers') leased by the plaintiff company ('P') which deals with shipping equipment, to the first defendant shipping line ('D1'). The second defendant ('D2') had custody of the subject containers at its shipyard upon the containers having been stored there by D1.

[2] After service of the writ and statement of claim ('SOC') on the defendants, P obtained a judgment in default of defence ('JID') against D1 wherein the following reliefs were granted by this court:

(a) a declaration that the 209 subject shipping containers were leased to D1 by P;

(b) a declaration that P is in law entitled to, or to the return of, the 209 shipping containers from D1; and

(c) damages to be assessed.

[3] Thereafter, following the JID entered against D1, the trial proceeded

against D2 only to determine who had the better right or entitlement in law to the subject containers. This question for adjudication would first require D2 to prove the existence of a contractual relationship between them and D1 to be conferred any right to the subject containers. P relies of the JID against D1 to prove the said contractual relationship with D1. The implication of the default judgment against D1 which is subsisting and remains in force to the primary issue at the trial is a question of law.

SUMMARY OF FACTS

[4] Briefly, the material facts are as summarised in P's submission as follows:

P is in the business of managing and/or leasing marine or intermodal shipping containers all over the world belonging to it or on behalf of other.

D1 is P's customer. It was wound up by the Shah Alam High Court on 17.02.2016 pursuant to a winding-up petition presented against it by P for the unpaid sum of USD$3,733,810.22 or RM13,775,892.80 as of 01.07.2015. An interlocutory judgment in default of defence in this action was entered by P against it on 23.05.2017.

D2 provides container storage service at its own premises at Pelabuhan Klang. It presently detains at its premises 209 shipping containers owned or managed by P, which were leased by P to D1 under their mutual contracts.

P now seeks the return of those 209 shipping containers but D2 refuses to do so as D2 contends that:

(i) it has a contract with D1;

(ii) D1 owes it money;

(iii) it is entitled to detain the 209 shipping containers because it claims to have a right of lien over them pursuant to their alleged contract; and

(iv) it was allegedly notified by D1 that the 209 shipping containers belong to D1.

P, on the other hand, contends that D2 has no contract or contractual relationship with D1, and that, consequently, D2 has no right to detain, or to the continued detention of, the 209 shipping containers, and that D2 must allow or not prohibit, the return of the same to P.

P, by its default judgment of 23 May 2017 has obtained against D1 these orders: (i) a declaration that the 209 shipping containers were leased to it by P; (ii) a declaration that P is in law entitled to, or to the return of, the 209 shipping containers; and (iii) an order for damages to be assessed.

P herein claims the following reliefs against D2:

(a) A declaration that D2 has no right or authority to hold or detain the 209 shipping containers, whether on the basis of an alleged lien or any other.

(b) An Order — endorsed with a penal notice in Form 83(c) Rules of Court 2012 — that D2 deliver up within 7 days the 209 shipping containers to the plaintiff or its servants or agents.

(c) Damages to be assessed.

(d) Costs.

AGREED/UNDISPUTED FACTS

(1) That the second defendant runs a business at Lot 10, Lingkaran Sultan Hishamuddin 2, Kawasan Perusahaan 20, Selat Klang Utara, 42000 Pelabuhan Klang, Selangor.

(2) That the plaintiff had written to the second defendant and the latter had responded in writing on 16 April 2015.

ISSUES OF DETERMINATION (ENCL 11)

(1) Whether there is any contractual relationship between the plaintiff and the first defendant.

(2) Whether there is any contractual relationship between the first defendant and the second defendant.

(3) Who between the plaintiff and second defendant has a right or is entitled in law to the 209 subject shipping containers presently held at the second defendant's premises?

(4) Whether the second defendant has any right or interest or authority to hold or detain and to continue to hold or detain the 209 subject shipping containers on lien allegedly for services rendered.

ANALYSIS AND FINDINGS

Issue of contract between P and D1

[5] P relied on the JID, entered against D1 in contending that this issue is now academic and relied on a leading Federal Court authority, *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 in support of this proposition. The material facts have been summarised by P as follows:

> ... the deceased Saribu was a registered co-proprietor of 1/3 undivided share in two lots of land. Saribu died in 1941 without issue. 43 years later, the first respondent there applied for and obtained an order to distribute Saribu's share in the two lots among himself and the second–fourth respondents. They (the first–fourth respondents) then sold and transferred their share in the two lots to the fifth and sixth respondents for consideration.
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> The appellants, being the nieces and nephews of Saribu, sued the first–sixth respondents to set aside the title acquired by the fifth and sixth respondents,

claiming there was fraud in the distribution of Saribu's estate by the first–fourth respondents. The appellants obtained judgment in default against first–fourth respondents. The fifth and sixth respondents claimed they were bona fide purchasers for value and that they had obtained indefeasible title.

The High Court ruled in favour of the fifth and sixth respondents and held that they had not acquired their title by fraud. The Court of Appeal subsequently upheld the decision of the High Court.

[6] In allowing the appeal against the decision of the Court of Appeal, the Federal Court decided, inter alia, an important question that is pertinent to the dispute in the instant case, namely:

What was the effect of the judgment in default, which set aside the letters of administration to the estate of the deceased, to the transfers of the lands of the estate of the deceased to the fifth and sixth respondents?

[7] The relevant passage from the judgment of the Federal Court reads as follows:

[10] ... Indeed, when the first to fourth respondents failed to defend the claim, it should be assumed that the appellants had made out fraud against the first to fourth respondents. It would be against all good sense and logic, quixotic in fact, to hold that an allegation, although unanswered, must yet be proved. In *Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185, where the plaintiff, who had obtained interlocutory judgment in default, applied for assessment of damages, Seah J, as he then was, duly assumed that all allegations in the statement of claim were deemed as proved:

> In assessing damages in this case, the court is placed in a predicament in that no evidence was given either by the plaintiff or the defendant. It follows that damages should therefore be assessed on the basis of the pleadings contained in the statement of claim. For the purpose of assessing damages in this case I would assume that all the allegations in the statement of claim are deemed to have been proved.

[10] When an allegation is unanswered, it must be assumed as proved, even if the party only swears to the best of his knowledge and belief (see *Williamson v Ah On* — BC2700043, where the High Court of Australia cited *Stokes v Grissell* 14 CB, at pp 689–690, where Williams J, said of chambers applications 'Where the party swears to the best of his knowledge and belief as to a matter upon which from its nature he cannot swear positively if the affidavit is unanswered by the other side, I assume the fact to be proved').

[11] Given that alleged fraud passed wholly unanswered by the first to fourth respondents, the trial court at 43 of the AR was wholly warranted to hold that with default judgment against the first to fourth respondents, fraud by them needed not to be proved by the appellants. But later, the trial court expressed an inconsistent opinion. At 52 of the AR, the trial court held, so as to distinguish *Tan Ying Hong*, that the default judgment was not a specific finding that the first to fourth

respondents committed fraud in the distribution of the estate of the deceased to themselves. With respect, the judgment was the judicial decree that fraud by the first to fourth respondents had been made out. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Lyd v Ajax Insurance Co Ltd* (1974) 2 ALR 321, where the High Court of Australia per Menzies J said '... the plaintiff's cause of action against the insured would merge in the judgment once it was obtained ...') and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v Baiduri Bank Bhd and another appeal* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed 'that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead'). Until set aside, the default judgment was the incontestable proof of fraud by the first to fourth respondents.

[8] The question that would naturally arise in the context of the present dispute and scenario is the effect on D2 of the JID that P has obtained against D1. It is indisputable that by virtue of the Federal Court judgment P would in law no longer have to prove the contractual relationship with D1, which would be assumed to have been proved as a result of the said JID. As P's allegations of fact as set out in the statement of claim against D1 have been left unanswered, the allegations are deemed to have been proved and assumed to be true and correct. Lastly, until the JID is set aside, it is considered as incontestable proof of the allegations.

[9] Additionally, P contended that there was irrefutable evidence to support the existence of a contractual relationship between P and D1 via the evidence of D1 themselves as reflected in the following events:

(a) the Kuching High Court ex parte order of 18 February 2015 obtained by D1 wherein D1 has explicitly acknowledged P as its creditor. See p4B. This evidence was not challenged by counsel for D2 during cross-examination of SP1; and

(b) the email issued by D1 to P on 18 February 2015 notifying P that P's 209 shipping containers are located at D2's premises. See p8B.

[10] P pointed out that the critical evidence as per (b) above went unchallenged during the cross-examination of PW1, the only witness for P and thus, must be deemed to be admitted.

[11] Having given due consideration to the principle of law relating to the effect of a JID that remains in force and the uncontradicted evidence as above,

the only conclusion would be that the contractual relationship between P and D1 concerning the subject containers has been well established.

[12] In any event, D2 in their submission only contended that they did not have a contractual relationship with P which they only had with D1. Further, that at all material times they dealt only with D1 based on which they had a right of lien over the subject containers. Hence, that any losses or damages sustained by P in respect of the lease of the subject containers to D1 should be directed at D1 only in accordance with the agreed terms in the TLA between P and D1 and not at D2 who were not a party to the same.

[13] Following the thrust D2's contention as above, the issue that calls for determination which is central to D2's defence is whether the existence of a contract between D2 and D1 has been proved. In this case, D2 made a positive assertion that they had entered into an oral contract with D1. P, in strenuously challenging this assertion, invoked the trite law principle of evidence that the burden lies wholly on D2 to prove this particular fact that they had positively asserted. P cited in support the Singapore Court of Appeal case of *Cooperative Centrale v Motorola Electronics* [2011] 2 SLR 63 (CA) where Chao Hick Tin JA remarked:

> Our decision
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> Whether MEPL or Rabobank bore the burden of proving a defence
>
> General principles
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> [30] It is now trite law that there is a distinction between the legal and evidential burden of proof. This court has explained the distinction between the two concepts in *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855 ('Britestone') at [58]:
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> > [58] The term 'burden of proof' is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. The obligation never shifts in respect of any fact, and only 'shifts' in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.
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> Sections 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ('Evidence Act'), which place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact respectively, concern the legal rather than the

A evidential burden of proof. The evidential burden, whilst not expressly provided for in the Evidence Act, exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led: Britestone, at [59]. It is the latter form of burden which may shift from one party to the other.

B [31] In civil trials, the pleadings are central in determining the occurrence of the burden of proof, because the pleadings state the material facts establishing the legal elements of a claim or a defence: *Pinsler, Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 12.33; *Phipson on Evidence (Hodge M Malek gen ed)* (Sweet & Maxwell, 17th Ed, 2009) ('Phipson') at para 6–06. The legal burden of proving a pleaded defence rests on the proponent of the defence, unless the C defence is a bare denial of the claim: *Currie v Dempsey* [1967] 2 NSWR 532 at p 539, followed by the Singapore High Court in *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212 ('*Wee Yue Chew*') at [3]. This rule is consistent with the general principle underlying ss 103 and 105 of the Evidence Act, that he who asserts must prove.

D ...

[14] Applying the principle expounded in the *Cooperative Central* case to the present facts, the burden of proving the aforesaid positive assertion lies on D2 E despite they being the defendant as their defence is not a mere bare denial but the assertion of a particular fact, namely, the agreement with D1 over the subject matter of the case. As conceded by D2 themselves, P had no involvement or connection with or the knowledge of, D2's contractual relationship with D1. Hence, naturally, the onus could not be on P to prove the F alleged contract between D2 and D1. That being the case, the question boils down to simply whether D2 had on the overall evidence proved the existence of the alleged oral contract with D1 as pleaded.

[15] In regard to the above central question, it is first essential to look at P's G pleaded case and evaluate the evidence that P adduced at the trial. D2's pleaded defence was, inter alia, that there was in existence an oral contract with D1. However, under cross-examination, DW1 the only witness representing D2 company asserted unequivocally that D2 had a formal, written contract with D1 contrary to D2's own pleaded case. DW1 also admitted under H cross-examination that he could not produce the alleged formal or written contract. It was plainly evident that the only documents that D2 tendered through DW1 to establish the purported contract with D1 have neither D1's nor D2's name. There was in fact none to prove that D1 and D2 together entered into a formal, written contract by consensus. Hence, the evidence led I on this issue fell far short of proving the existence of the said contract in writing as alleged.

[16] D2, inter alia, also placed much reliance on its statement of accounts ('SOA') exhibited in the bundle of documents in order to show that D1 was

their customer at the material time. However, as pointed out by P, the SOA failed to show this alleged fact as it reflects the name of a company that is a different entity from D1, namely, Hub Line Shipping Sdn Bhd, whereas D1 is a company called Hub Shipping Sdn Bhd DW1 conceded that the SOA was not made to D1 but to Hub Line. More importantly, that he could not produce any invoices by P or Timur Permai who prepared the SOA, issued to Hub Shipping ('D1').

[17] A point of significance is that although D1's alleged debt to D2 now stands at more than RM1m D2 has todate not sued D1 for the debt. DW1 admitted that despite the alleged debt having escalated from a few hundred thousands to the present figure there was not even a letter of demand issued to D1, leave alone legal action against D1. DW1 merely gave the excuse that the business between the two parties was ongoing. Also noteworthy is the fact that D2 did not request D1's solicitors to include D2 in D1's list of creditors following the ex parte order obtained on 18 February 2015 at the Kuching High Court to restrain D1's creditors from suing D1. DW1 could not offer any explanation as to why D2 did not take any steps to ensure that D2 was included in the list of creditors.

[18] Neither did D2 file any proof of debt with D1's liquidators after D1 was eventually wound up.

[19] As DW1 asserted without qualification in defending D2 against this claim that the continued detention of the subject containers by D2 was predicated on a lien over the same based on a formal written contract with D1 that conclicted D2's own pleaded defence, issues (C) and (D) require no further deliberation. D2's claim that they have a right of lien over the subject containers was only because they had a contract with D1 which was pleaded to be an oral contract. However, the evidence of DW1 himself as contended by P had the effect of demolishing D2's pleaded case when he maintained that D2's alleged contract with D1 was in the nature of a formal or documented/written contract which D2 failed to produce at the trial. Instead, the documentary evidence that D2 produced did neither support nor disclose even the existence of a contract between D1 and D2, which thus, remained unproven.

[20] D2 in their defence alleged, inter alia, that having provided certain services like storage, loading on and off, repairs, etc of D1's containers at the latter's request, an oral contract came into existence between D1 and D2. As a result, D2 purportedly had a lien over the subject containers until full remuneration was paid for the said services by D1 which was still due and owing by D1. Also that as the containers were at the material time in the possession of D2, they had right to detain the same until full remuneration was received under the purported contract.

[21] It would, thus, be seen that D2's pleaded defence relies primarily on the concepts of lien and bailment. Leaving aside the failure of D2 to establish the existence of a valid and enforceable contract with D1 in respect of certain services alleged to have been provided to D1 as adverted to, it would be useful to look at whether the legal requirements of lien and bailment have been met through the evidence led by D2.

[22] To begin with liens, there are two broad categories which are recognised, namely, legal or common law and equitable liens. This area of the law is well expressed in the case cited by P, *Re Caveat No CV/21366D* [1996] 1 SLR(R) 70 at p 73 where GP Selvam, J held:

> A lien by definition is 'a right in one man to retain that which is in his possession belonging to another, till certain demand of him, the person in possession, are satisfied'. See *Hammonds v Barclay* (1802) 2 East 227. The lien, therefore, is enforced by retaining possession of the property until the money is paid. The money must be payable before or at the time the possession of property in question is to change hands. If the money is due at a future date, that is after possession of the property is transferred, there is no lien. What I have stated are the characteristics of a legal lien, that is a lien defined by the common law and it arises by operation of law although such a lien can also be granted by contract.
>
> Equity recognises a lien for unpaid purchase money or obligation. Such a lien is called vendor's lien. It is available in respect of the purchase price or other monetary obligation: see *Uziell-Hamilton v Keen* (1971) 22 P & CR 655. The lien entitles the vendor, subject to the terms of the contract, to retain possession and the income of the property between contract and completion: see In *re Hamilton-Snowball's Conveyance* [1959] Ch D 308. The equitable lien arises when the contract is made and continues even after possession and title are transferred to the purchaser and remains until the vendor received the price payable before or at the time of completion. The lien is enforced by an application to the court for the sale of the property or even for an order that the vendor be restored to possession: see *In re Birmingham, Savage v Stannard* [1959] Ch D 523, *Gibson's Conveyancing* (21st Ed) at p 189 and *Snell's Equity* (29th Ed) at pp 463–466.

[23] It is trite that where an equitable lien is invoked, which appears to be the case in this instance, there could not be any lien unless there is a specifically enforceable contract (see *Chip Thye Enterprise v DBS* [1993] 3 SLR(R) 380).

[24] Whether it is a legal lien or equitable lien that is being relied upon by P as the vendor of goods or services under a contract, P would be entitled to retain possession of the goods until they have received full contractual payment as the agreed consideration.

[25] In respect of a legal lien, the ingredients under s 123 of the Contracts Act 1950 must be satisfied. The section states that:

123 Bailee's particular lien

Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain the goods until he receives due remuneration for the services he has rendered in respect of them.

[26] First and foremost, D2 did not lead any evidence to establish a bailor-bailee relationship between the two parties ('D1 and D2'). Neither as to who were the bailor and bailee respectively. D2 are merely asserting that the 209 subject containers are presently in their possession at their depot. In D2's written submission, it is contended that there is an agent-principal relationship between D1 and D2 without alluding to any evidence showing for whom D2 was acting as an agent. More importantly, no evidence was led showing the existence of a contractual relationship in respect of the goods in their possession.

[27] In order to sustain D2's claim that they had right to retain the subject containers until their services are paid for, evidence of service provided as a bailee at the request of the bailor ('D1') is a must. D2 clearly omitted to put forward the requisite evidence, particularly by producing the alleged invoices issued to D1. Likewise, evidence of any request for service by D1 to D2.

[28] In view of the obvious failure of D2 to prove a bailor-bailee relationship with D1 which they are required to do under s 101, C/A where the words 'upon a contract' are expressly used, D2 cannot be said to have established any right to retain the subject containers until full settlement for their alleged services. To be noted is the fact that in the case of *Lee Container v Tahan Tractor* [1996] 1 MLRH 146 which was among the authorities that D2 relied upon, the factual matrix can be distinguished from the present facts as pointed out by P. Inter alia, in that case the bailor-bailee relationship was clearly identified and the evidence of contractual relationship was undisputed, whereas in this case the same is strenuously contested.

[29] As for D2's alleged right of lien against P, this assertion is wholly unsustainable as it is common ground between D2 and P that there was no contract between them at the material time. The law is settled that the claim of a lien is only maintainable if there is in existence a contract between the parties. It would suffice to quote the Court of Appeal case of *Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd* [2006] 4 MLJ 189; [2006] 3 CLJ 72 where Gopal Sri Ram JCA (as he then was) remarked:

With respect we are unable to agree with the arguments of learned counsel. In our judgment when the above passages are read in the context of the whole case there is no contradiction between them at all. To paraphrase the learned judge, this is what he was saying. That the CLC shares were secured by the two share certificates. That

A the loans were taken by PW1, ie, Dato Yussof Latiff and the latter loans were obtained by pledging the same two share certificates with various other financial institutions and the monies obtained thereby were used by the Chan family, Dato Yussof and one Syed Azahari. It was for the defendant of course to establish that there was an agreement between itself and the plaintiff in order to maintain its claim
B of a lien over the shares in question. Needless to say the defendant did not come up with proof. That is hardly surprising because nowhere in its pleaded case is there mention of an agreement between itself and the plaintiff in respect of the shares. As may be seen from its amended case already referred to earlier, its dealings were with Dato Yussof. It is apparent to us that there is a confusion in the appellant's mind about the dealings that form the factual matrix of its defence.
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It is trite that a company is a separate individual from its share-holders and directors. The property of the company belong to the company, not to the share-holders or directors. These elementary principles were established in the seminal case of *Salomon v Salomon & Co* [1897] AC 22 at p 30. Recently, this court had the
D occasion to reemphasise this point in *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 (CA).

[30] Next for consideration is D2's contention that P had failed to prove that they owned the subject containers. In reply, P contended that this line of
E defence is misconceived and untenable for the following reasons which I upheld:

First, it was never P's pleaded case that it owns the 209 shipping containers. P instead pleaded that it is the lessor vis a vis D1 as lessee. Second, both P and D2 had committed to an agreed list of issues — see E — which does not call for proof of
F ownership. Each party merely has to prove that they each have a contractual relationship with D1. Third, P has already established its legal right to those 209 shipping containers by virtue of its default judgment obtained against D1, in which this court granted, its default judgment obtained against D1, in which this court granted, among others, declarations that the 209 shipping containers were leased to
G D1 by P; and that P is entitled in law to or to the return of the said 209 shipping containers, which are presently held or detained by D2.

[31] Lastly, D2 contended that P must seek remedy for their loss from D1 and cannot sue D2 by reliance on these leading authorities:

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(a) *Polygram Records Sdn Bhd v Hillary Ang & Ors* [1988] 3 MLJ 37; [1994] 2 MLRH 137; and

(b) *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293; [2004] 2 MLRA 462.

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[32] This contention can be disposed of *in limine* as this was never a pleaded issue. Further, the facts of the above cases differ significantly from the present. In this instance as compared to those cases, P is a complete stranger to the purported lease agreements between D1 and D2. By virtue of the doctrine of

privity of contract, it is trite law that a non-party has no right to sue under the contract. Hence, the contention that P should sue D1 only for compensation is plainly baseless based on principles of contract law.

CONCLUSION

[33] Parties have identified specifically and agreed on the issues to be tried. To sum up, my findings on the core issues are as summarised below.

[34] Beginning with the first and foremost issue, it is crucial to note that plaintiff ('P') has obtained a judgment in default ('JID') against the first defendant ('D1') which has not been set aside and is binding and enforceable. Therefore, the issues pleaded by the P against D1 in the writ and statement of claim have been settled and can no longer be disputed as D1 has admitted the same. In the context of this trial, the contractual relationship between P and D1 in respect of the subject-matter of this claim, ie, the 209 containers in the possession of D2, cannot as such be disputed. It follows that by virtue of the JID the unchallenged allegations as pleaded against D1 as to the ownership of the 209 containers by P are considered to have been proved. The principle in the Federal Court case of *Kamarulzaman Omar v Yakub bin Husin* is binding on this court.

[35] Accordingly, for the defence of D2 to succeed, the evidential burden falls on D2 to prove the existence of a contract with D1 as alleged for services rendered. This is the second agreed issue for determination. D2's evidence on this issue given by the DW1 himself that there was a formal, written contract with D1 is clearly contrary to D2's own pleaded case on this crucial issue. It is a trite law that any evidence that contradicts a party's own pleadings cannot be considered and ought to be rejected. More importantly, the purported formal contract was not produced as evidence to support D2's defence, which, in my view is fatal to D2's as raised at the trial defence. Most importantly, most of the documentary evidence relied upon by D2, particularly the Statement of Accounts do not refer to D1 but to a different corporate entity which is not a party to this case.

[36] It is plain that D2's alleged legal right to the 209 shipping containers to recover the debt due from D1 is dependent wholly on existence of a contract between D1 and D2 for provision of certain services. The same applies to D2's alleged right of lien over the property against D1. Neither have the conditions and ingredients under s 123 of the Contracts Act 1950 for a claim of bailment over the property to succeed been met. The existence of a bailor-bailee relationship between D1 and D2 in respect of the property which is vital to sustain such a claim has clearly not been established by the evidence adduced by D2.

A **[37]** Having considered the evidence as a whole and the respective contentious made on behalf of P and D2, it is found in relation to the issues in dispute that D2 has failed to satisfy the onus of proving the existence of a valid and enforceable contract with D1 to establish its defence and right to the subject-matter of this action pursuant to the doctrine of lien and bailment. P
B has, on the evidence and facts as a whole, proved on a balance of probabilities its claim to the ownership of the 209 shipping containers and for their return to P's possession.

C **[38]** On the abovementioned grounds, the court allows P's claim against D2 and accordingly, judgment is entered for P against D2 as prayed for in prayers (c), (d), (e) and (f) with costs fixed by the court in the sum of RM30,000.

Plaintiff's claim allowed with cost of RM30,000.

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Reported by Mohd Kamarul Anwar

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